Riad Galal Mohamed Aboutok & Anor v Somaline Auto Services Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA22NCC-350–08 OF 2017
AZIZUL AZMI ADNAN J
21 MAY 2019

Civil Procedure — Pleadings — Departure from — Plaintiffs sued defendants for breach of sale of shares agreement and settlement agreement — Plaintiffs urged court to find third defendant liable of fraud — Whether claim of fraud represented a radical departure from plaintiffs' pleaded case

Contract — Breach — Agreement — Breach of sale of shares agreement and settlement agreement by defendants — Whether plaintiffs discharged evidential burden of proving existence of debt — Whether settlement agreement not enforceable because company seal was not affixed on agreement — Whether settlement agreement not enforceable as there was no resolution by board of directors of company authorising execution — Whether settlement agreement not enforceable because matters contemplated in joint venture agreement did not materialise — Whether defendants' liability to pay debt extinguished as shares were never transferred to plaintiffs — Whether agreements unenforceable on account of frustration

This was an action by Riad Galal Mohamed Aboutok ('the first plaintiff') and Aseel Resources Sdn Bhd ('the second plaintiff') against Somaline Auto Services Sdn Bhd ('the first defendant'), AlAqsa Resources Group Sdn Bhd ('the second defendant') and Motasem Mk Qasem ('the third defendant') for breach of contract. The second plaintiff had entered into a joint venture agreement ('JVA') with the second defendant, pursuant to which the second plaintiff had advanced certain sums of money to the second defendant which was never repaid. The first plaintiff also invested a sum of over RM1m into the first defendant which at all material time was under the control of the third defendant. At some point, the first plaintiff only discovered that the total cost of setting up the car workshop was RM200,000 and the monies transferred to the third defendant were not utilised for the business of the first defendant. Upon being questioned about the monies paid pursuant to the JVA, the third defendant issued two cheques totalling to RM2,036,000 to the first plaintiff which were dishonoured and the first plaintiff reported the matter to the police. The second and third defendants subsequently contacted the first plaintiff to settle the debts owed by the second and third defendants and they entered into a settlement agreement and a sale of shares agreement ('SSA') and

the first plaintiff was told by the second defendant that he would sign the agreements if the first plaintiff withdrew the police report which the first plaintiff did. Both the agreements were executed on 28 March 2016. The parties to the settlement agreement were all the parties to the present action. The settlement agreement stated that: (a) the third defendant had agreed to purchase the first plaintiff's 30% share in the first defendant for RM1.3m; (b) the second defendant owed RM500,000 to the second plaintiff pursuant to the JVA; and (c) the third defendant owed RM200,000 to the first plaintiff ('Motasem debt'). In the present action, the plaintiffs claimed that none of the amounts payable under the SSA or the settlement agreement was ever paid by the defendants. Further, the plaintiffs urged the court to find the third defendant liable for fraud. The defendants did not dispute the authenticity of the settlement agreement, but they took issue with its enforceability. The second defendant contended that the settlement agreement was not enforceable because: (i) its company seal was not affixed on the settlement agreement (the first contention); (ii) there was no resolution passed by the board of directors of the second defendant authorising its execution (the second contention); and (iii) the matters contemplated by the JVA did not materialise (the third contention). The third defendant contended that he was not liable to pay the RM1.3m consideration for the 30% shares in the first defendant because: (1) the SSA never proceeded to completion; and (2) the first defendant had been struck off the companies register, as such, both the SSA and the settlement agreement was unenforceable on account of frustration.

Held, allowing the claims in part with costs of RM20,000:

(1) Once the settlement agreement was accepted into evidence, the plaintiffs would have succeeded to discharge the evidential burden of proving the existence of the debts. The evidential burden then shifted to the defendants to challenge the accuracy of the recitals. If the third defendant's position was that the Motasem debt did not exist, then an explanation ought to be forthcoming from him as to why he nonetheless continued to sign the settlement agreement. The failure by the third defendant to provide a credible explanation (or any explanation, for that matter) meant that the court must accept the plaintiff's contentions regarding the existence of the debts as being the truth (see para 38).

(2) The third contention of the second defendant clearly did not hold water. It was because of the fact that the joint venture did not materialise that it became necessary for the second defendant to return the advances made by the second plaintiff. In respect of the first contention of the second defendant, the settlement agreement need not be executed under seal. An agreement would be binding on a company even though it was executed under hand by its agent (see paras 41–42).

(3) With regards to the second contention of the second defendant, reliance

may not be placed on the rule in *Turquand*'s case where the person dealing with the company in question has notice of any irregularity on the authority of the person with whom he is dealing. In the context of the present case, no such irregularity was pleaded. Nor was any evidence led that suggested there existed any infirmity in the third defendant's authority to deal on behalf of the second defendant. In the circumstances, it was perfectly reasonable for the plaintiffs to expect that the second defendant had complied with its own internal procedures to ensure that the third defendant had the requisite authority to execute the settlement agreement on its behalf (see paras 48–50).

(4) On a true construction of the settlement agreement, the fact that the shares were never transferred did not have the effect of extinguishing the debt, which remained payable under the terms of the settlement agreement. In addition, the facts as pleaded were sufficient to support an action on the original debt, and as such, it was immaterial that the SSA did not proceed to completion or that there was frustration of the SSA. Further, it was not open to the third defendant to rely upon frustration that was self-induced in order to escape his payment obligations under the SSA and the settlement agreement (see para 53).

(5) The contention of fraud represented a radical departure from the plaintiffs' pleaded case. That would be impermissible without an amendment to the pleadings. The proper course would have been to for counsel for the plaintiff to apply, at the earliest available opportunity, to amend the pleadings when it became clear that the evidence sought to be adduced by the defence supported an alternative plea of fraud. An application for amendment in such circumstances would be justified as the evidence was not earlier available to the plaintiffs (see para 85–86).

[Bahasa Malaysia summary

Ini merupakan satu tindakan yang diambil oleh Riad Galal Mohamed Aboutok ('plaintif pertama') dan Aseel Resources ('plaintif kedua') terhadap Somaline Auto Services Sdn Bhd ('defendan pertama'), AlAqsa Resources Group Sdn Bhd ('defendan kedua') dan Motasem Mk Qasem ('defendan ketiga') untuk pelanggaran kontrak. Plaintif kedaua telah memasuki satu perjanjian usaha sama ('PUS') dengan defendan kedua, yang mana, berdasarkan PUS tersebut, plaintif kedua telah mendahulukan sejumlah wang kepada defendan kedua yang tidak pernah dibayar semula. Plaintif pertama juga telah melabur RM1 juta dalam defendan pertama yang mana pada semua masa material berada di bawah kawalan defendan ketiga. Pada satu ketika, plaintif pertama hanya mendapati jumlah kos untuk menyediakan bengkel kereta tersebut adalah RM200,000 dan wang yang dipindahkan kepada defendan ketiga tidak digunakan untuk perniagaan defendan pertama. Selepas disoal berkenaan dengan wang yang dibayar selaras dengan PUS, defendan ketiga telah mengeluarkan dua cek berjumlah RM2,036,000 kepada plaintif

pertama yang kemudiannya didapati tidak laku dan plaintif pertama telah melaporkan perkara tersebut kepada pihak polis. Defendan kedua dan ketiga telah kemudiannya menghubungi plaintif pertama untuk melangsaikan hutang yang dihutang oleh defendan kedua dan ketiga dan mereka telah memasuki satu perjanjian penyelesaian dan perjanjian penjualan syer ('PPS') dan plaintif pertama telah diberitahu oleh defendan kedua bahawa dia akan menandatangani perjanjian tersebut sekiranya plaintif pertama menarik balik laporan polis, yang mana perkara ini telah dilakukan oleh plaintif pertama. Kedua-dua perjanjian telah dilaksanakan pada 28 Mac 2016. Pihak-pihak kepada perjanjian penyelesaian yang mana kesemuanya merupakan pihak kepada tindakan ini. Perjanjian penyelesaian tersebut menyatakan bahawa: (a) defendan ketiga bersetuju untuk membeli saham 30% plaintif pertama dalam defendan ketiga untuk RM1.3 juta; (b) defendan kedua berhutang RM500,000 kepada plaintif kedua selaras dengan PUS; dan (c) defendan ketiga berhutang RM200,000 kepada plaintif pertama ('hutang Motasem'). Dalam tindakan ini, plaintif menyatakan bahawa tiada sebarang daripada jumlah yang perlu dibayar dibawah PPS atau perjanjian persetujuan, tetapi mempersoalkan kebolehan untuk menguatkuasakannya. Defendan kedua menyatakan bahawa perjanjian persetujuan tidak boleh dikuatkuasakan kerana: (i) meterai syarikatnya tidak diletakkan pada perjanian penyelesaian (hujahan pertama); (ii) tiada resolusi diluluskan oleh lembaga pengarah defendan kedua meluluskan pelaksanaannya (hujahan kedua); dan (iii) perkara yang dinyatakan dalam PPS tidak berlaku (hujahan ketiga). Defendan ketiga menyatakan bahawa dia tidak bertanggungan untuk membayar RM1.3 juta untuk 30% saham dalam defendan pertama kerana: (1) PPS tersebut tidak diteruskan kepada ianya lengkap; dan (2) defendan pertama telah dibatalkan daripada daftar syarikat, oleh itu, PPS dan perjanjian penyelesaian tidak boleh dikuatkuasakan atas sebab kekecewaan.

Diputuskan, membenarkan sebahagian tuntutan dengan kos RM20,000:

(1) Setelah perjanjian penyelesaian diterima sebagai keterangan, plaintif telah berjaya untuk memenuhi beban pembuktian untuk membuktikan kewujudan hutang. Beban pembuktian telah berpindah kepada defendan kedua yang mencabar ketepatan pengataan-pengataan. Sekiranya pendirian defendan ketiga adalah bahawa hutang Motasem tidak wujud, maka satu penjelasan harus dikemukakan olehnya mengapa dia tetap menandatangani perjanjian persetujuan. Kegagalan defendan ketiga untuk mengemukakan penjelasan kredibel (atau apa-apa penjelasan) bermaksud bahawa mahkamah harus menerima pengataan plaintif berkaitan dengan kewujudan hutang tersebut sebagai benar (lihat perenggan 38).

(2) Hujahan ketiga defendan kedua secara jelas tidak boleh ditampung. Ini adalah kerana fakta bahawa usaha sama tersebut tidak berlaku yang memerlukan defendan kedua untuk memulangkan pendahuluan yang

dibuat oleh defendan kedua. Berkenaan dengan hujahan pertama defendan kedua, perjanjian penyelesaian tidak perlu dilaksanakan dibawah apa-apa meterai. Satu perjanjian akan mengikat satu syarikat walaupun ianya dilaksanakan oleh agennya (lihat perenggan 41–42).

(3) Berkenaan dengqan hujahan kedua defendan kedua, kebergantungan tidak boleh diletakkan kepada peraturan dalam kes *Turquand* yang mana individu yang berusuran dengan syarikat yang dipersoalkan telah memerhatikan apa-apa perkara yang berada diluar aturan berkenaan dengan kuasa orang yang dia berususan dengan. Dalam konteks kes ini, tiada sebarang perkara diluar aturan telah diplid. Tiada juga sebarang keterangan yang dikemukakan yang mencadangkan wujud apa-apa kecacatan dalam kuasa defendan ketiga untuk berurusan bagi pihak defendan kedua. Dalam keadaan ini, adalah munasabah untuk plaintif mengharapkan agar defendan kedua telah mematuhi semua prosedur dalamannya untuk memastikan defendan ketiga mempunyai kuasa yang diperlukan untuk melaksanakan perjanjian penyelesaian bagi pihaknya (lihat perenggan 48–50).

(4) Berdasarkan satu penafsiran benar perjanjian penyelesaian, fakta bahawa saham tidak pernah dipindahkan tidak mempunyai kesan untuk melunaskan hutang tersebut, yang masih perlu dibayar dibawah terma perjanjian penyelesaian. Lanjutan, fakta yang diplid adalah memadai untuk menyokong satu tindakan dalam hutang asal, oleh itu, ianya tidak material bahawa PPS tidak diteruskan sehingga penyelesaian atau wujud kekecewaan yang telah dilakukan secara sedirinya untuk mengelak tanggungjawab untuk membuat pembayaran dibawah PPS dan perjanjian penyelesaian (lihat perenggan 53).

(5) Hujahan bahawa fraud mewakili satu peninggalan besar daripada kes yang diplid oleh plaintif. Ianya tidak boleh dibenarkan tanpa pindaan kepada pliding. Hala tuju yang sepatutnya adalah untuk peguam plaintif untuk membuat permohonan, seawal yang boleh, untuk meminda pliding apabila ianya menjadi jelas bahawa keterangan yang hendak dikemukakan oleh pembelaan menyokong satu pli fraud alternatif. Permohonan untuk pindaan dalam keadaan tersebut mempunyai alasan yang kuat kerana keterangan tersebut tidak ada pada plaintif pada awalnya (lihat perenggan 85–86).]

Notes

For cases on departure from pleadings, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 7440–7453.

For cases on agreement, see 3(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 3702–3743.

Cases referred to

BIG Industrial Gas Sdn Bhd v Pan Wijaya Property Sdn Bhd and another appeal [2018] 3 MLJ 326; [2018] 9 CLJ 1; [2018] 2 MLRA 577, CA (refd)
Maritime National Fish Ltd v Ocean Trawlers Ltd [1935] All ER Rep 86; [1935] AC 524, PC (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465; [1998] 1 AMR 169; [1998] 1 CLJ 793; [1997] 2 MLRA 202, FC (refd)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464; [2016] 1 CLJ 177; [2016] 1 MLRA 1, FC (refd)
Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal [2013] SGCA 43, CA (refd)
Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185; [1994] 3 AMR 1882; [1994] 3 CLJ 567; [1994] 1 MLRA 300, SC (refd)
The Royal British Bank v Turquand (1856) 119 ER 886, KB (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212; [1980] 1 MLRA 125, FC (refd)

Legislation referred to

Evidence Act 1950 ss 92(f), 103
Rules of Court 2012 O 34 r 2(e)

SS Gabriel (N Saraswathy Devi) for the plaintiffs.
Loi Kwong Fong (Lee Poh Ling with him) (Loi & Co) for the defendants.

Azizul Azmi Adnan J:

INTRODUCTION

[1] The plaintiffs sued the defendants for breach of contract.

[2] The first plaintiff, Riad Galal Mohamed Aboutok ('Riad'), is a Palestinian national. Riad is a director of the second plaintiff, Aseel Resources Sdn Bhd ('Aseel Resources'). Riad and his wife own the entire issued share capital in Aseel Resources.

[3] Motasem, the third defendant, is also Palestinian. He is a director of AlAqsa Resources Group Sdn Bhd, the second defendant ('AlAqsa'). He also holds 95% of its issued shares.

[4] Somaline Auto Services Sdn Bhd ('Somaline Auto Services'), the first defendant, was intended to be a joint venture company between Riad and Motasem. Riad held 30% of its issued shares, while the Motasem directly held 40%. The first defendant did not enter a defence. It had been struck off the

companies register maintained by the Companies Commission of Malaysia shortly after this suit was commenced, on 2 November 2017 (see p 9 of the notes of evidence).

[5] For the purposes of this judgment, references to the 'defendants' will be taken to mean the second and third defendants.

THE PLAINTIFF'S CASE

[6] Aseel Resources had entered into a joint venture agreement on 20 August 2015 with AlAqsa. Pursuant to this joint venture agreement, Aseel Resources Sdn Bhd had advanced certain sums of money to AlAqsa. This money was never repaid.

[7] Riad also invested a sum of over RM1m into Somaline Auto Services for the purposes of setting up a car workshop. According to Riad, Somaline Auto Services was at all material times under the control and management of Motasem.

[8] Aseel Resources also advanced a further RM300,000 to AlAqsa on 12 January 2016.

[9] At some point, Riad discovered the total cost of setting up the car workshop only amounted to RM200,000, and that the money that he had transferred to Motasem had not been utilised for the business of Somaline Auto Services. Upon being questioned about the money that had been paid pursuant to the JVA, and the advances made by Riad and Aseel Resources, Motasem issued two cheques totalling RM2,036,000 to Riad.

[10] The cheques were dishonoured.

[11] Riad then reported the matter to the police.

[12] Subsequently, Motasem contacted Riad, ostensibly to settle the debts owed by him and AlAqsa. For this purpose, Motasem instructed a firm of solicitors to prepare a settlement agreement and a sale of shares agreement ('SSA'). Riad was told by Motasem that he (Motasem) would sign the agreements if Riad withdrew his police report, which Riad duly did.

[13] The settlement agreement and the SSA were executed on 28 March 2016.

[14] The parties to the SSA were Motasem and Riad. According to its terms,

Motasem was to purchase Riad's 30% share in Somaline Auto Services for RM1.3m (this was the sum that Riad claimed had been invested by him in Somaline Auto Services). The consideration was to be payable in five instalments beginning on 30 April 2016.

[15] The parties to the settlement agreement were all the parties to this action: on the one hand there were the plaintiffs, Riad and Aseel Resources, who were the persons to whom debts were owed. On the other were the defendants, Somaline Auto Services, AlAqsa and Motasem.

[16] The settlement agreement recited the following facts:

(a) that Motasem had agreed to purchase Riad's 30% share in Somaline Auto Services for RM1.3m;

(b) that AlAqsa owed RM500,000 to Aseel Resources pursuant to the joint venture agreement of 20 August 2015; and

(c) that Motasem owed RM200,000 to Riad (defined in the settlement agreement as the 'Motasem debt', which definition I adopt here).

[17] Under the terms of the settlement agreement:

(a) Motasem agreed to repay Riad RM1.5m in five monthly instalments of RM300,000, with the first instalment being payable on 30 April 2016. It may be observed that this amount includes the RM1.3m payable as consideration for the Riad's shares in Somaline Auto Services; and

(b) AlAqsa agreed to repay Aseel Resources RM500,000 in five monthly instalments of RM100,000, also beginning on 30 April 2016.

[18] The way in which the personal debts of Motasem to Riad were described in the settlement agreement gives rise to a little confusion, for they included the amounts payable under the SSA. In order to better understand the various payment obligations under both agreements, I have summarised them in the following table:

Obligor		*30 April 2016*	*31 May 2016*	*30 June 2016*	*31 July 2016*	*31 August 2016*	*Total*
Motasem	Consideration for Somaline Auto Services shares	260,000	260,000	260,000	260,000	260,000	1,300,000
	The Motasem Debt	40,000	40,000	40,000	40,000	40,000	200,000
AlAqsa	Advances under the JVA	100,000	100,000	100,000	100,000	100,000	500,000
Total							2,000,000

All figures in Malaysian ringgit

[19] The SSA was expressed to be subject to a condition precedent, which was a waiver of any first right of refusal held by any of the other shareholders in the company (see the Schedule to the SSA, exh P3).

[20] The plaintiffs claimed that none of the amounts payable under the SSA or the settlement agreement was ever paid by the defendants.

THE DEFENCE

[21] The gist of the pleaded defence were as follows:

(a) the SSA never proceeded to completion, and as such, Riad's 30% shares in Somaline Auto Services were never transferred to Riad. Motasem was thus not liable to pay the consideration of RM1.3m;

(b) Somaline Auto Services had ceased to exist as of 2 November 2017, when it was struck off the companies register. As such, the settlement agreement was unenforceable on account of frustration;

(c) the existence of the Motasem debt was denied by Motasem, and the plaintiff was put to strict proof in this regard;

(d) the settlement agreement was unenforceable against the AlAqsa because:

(i) it was not affixed with its company seal;

(ii) there was no resolution passed by the board of directors of AlAqsa authorising its execution; and

(iii) the matters contemplated by the joint venture agreement of 20 August 2015 did not materialise.

[22] It is pertinent to note that the existence of the settlement agreement was not disputed by the defendants. At paras 7(a) and (b) of their defence, it was stated:

7. ... Defendan Kedua dan Defendan Ketiga mengatakan bahawa:

(a) terdapat satu Perjanjian Penyelesaian bertarikh 28-3-2016 ('Perjanjian Penyelesaian tersebut') telah dimasukkan antara Plaintif Pertama dan Defendan Ketiga;

(b) Perjanjian Penyelesaian tersebut adalah untuk tujuan membeli saham-saham Plaintif Pertama di syarikat Defendan Pertama dengan harga belian RM1,300,000;

EVIDENCE RECEIVED AT TRIAL

[23] The following paragraphs highlight the evidence received at trial relating to three key areas: the events leading to Somaline Auto Services being

struck off the companies register, the additional documents adduced at trial by the defendants to explain how the money had been spent, and the testimony of the solicitor who had prepared the settlement agreement and the SSA.

The evidence of the CCM officer

[24] The plaintiffs' first witness was an officer from the Companies Commission of Malaysia. PW1 testified that on 4 November 2016 Motasem had made an application to strike Somaline Auto Services from the companies register. The reasons cited in his application for the striking off of the company are reproduced *verbatim et literatim* below:

(a) the company was incorporated on 19 January 2016 and has not commenced business and there is no transaction since then;

(b) the company has not opened a bank account; and

(c) the company has no intention to commence business or operation in the future and has insufficient funds to pay for the winding up expenses and as such application is made to strike of the company under s 308(1) of the Companies Act 1965 (see exh P1).

[25] Somaline Auto Services was struck off the companies register on 2 November 2017.

The inclusion of an additional trial bundle

[26] On 12 June 2018 — the day before the first day of trial — the defendants filed an additional bundle of documents. Despite the fact that prior leave of court was not obtained, counsel for the plaintiff did not object. The additional bundle was tendered, and categorised in part B for the purposes of O 34 r 2(e) of the Rules of Court 2012, as documents the authenticity of which were not disputed, but which contents were in dispute.

[27] A draft additional witness statement of Motasem was filed on the same day.

[28] Motasem subsequently testified that he had invested RM1.4m into Somaline Auto Services Sdn Bhd and referred to various documents that was adduced as part of the additional trial bundle, which had been marked as B2.

[29] Among the documents adduced were invoices addressed to 'Somaline Sdn Bhd' (see B2/19, 21, 22, 26, 28, 49, 56, 58, 61, 62, 63, 66, 67), and cheques issued by Somaline Sdn Bhd (see B2/23, 25, 42, 59, 60) (as opposed to 'Somaline Auto Services Sdn Bhd').

[30] In the meantime, between the time bundle B2 was filed with the court registry and when the trial resumed on 27 June 2018, Ms Gabriel for the plaintiffs had undertaken a search with the Companies Commission of Malaysia over 'Somaline Sdn Bhd'. The results of the search (see exh P5) revealed that Somaline Sdn Bhd had been incorporated on 8 December 2015. Motasem was a director of this company, and held 60% of its issued share capital. Riad was neither a director of nor a shareholder in Somaline Sdn Bhd.

The evidence of the solicitor

[31] The plaintiffs' second witness was the advocate and solicitor who had prepared the settlement agreement and the SSA, Mr David Chang of Mustafa Ling & Co. Mr Chang was a solicitor of considerable experience, having been in practice for 23 years. He testified that Motasem was the person who had given him instructions to prepare the documents.

[32] Mr Chang testified that following the execution of the SSA but before the expiry of the period for the fulfilment of the conditions precedent under the SSA, he had written to the company secretary for documents relating to the transfer of shares to be prepared. He then wrote to Riad asking for the relevant documents to be placed into escrow.

[33] In relation to the issue of the authority of the Motasem to execute the settlement agreement on behalf of AlAqsa, he testified that there were no circumstances that he considered required him to make any further inquiries (see p 28 of the notes of proceedings).

[34] In the following paragraphs, I deal with each of the three debts claimed in turn.

THE MOTASEM DEBT

[35] According the defendants' pleaded case, they did not dispute the authenticity of the settlement agreement. They merely took issue with its enforceability (see para 7 of the statement of defence, reproduced at para 22 above).

[36] Motasem had put Riad to strict proof as to the existence of the Motasem debt (see para 7(g) of the statement of defence).

[37] In my judgment, plaintiffs have succeeded to prove the existence of the debts owed by the defendants by adducing the settlement agreement. The defendants accepted the settlement agreement as genuine, and did not seek to challenge the statements contained in Recitals B, C and D in the settlement

agreement that explained the provenance of the debts. A

[38] Once the settlement agreement was accepted into evidence, the plaintiffs would have succeeded to discharge the evidential burden of proving the existence of the debts. The evidential burden then shifted to the defendants to challenge the accuracy of the recitals. If Motasem's position was that the Motasem debt did not exist, then an explanation ought to be forthcoming from him as to why he nonetheless continued to sign the settlement agreement. The failure by Motasem to provide a credible explanation (or any explanation, for that matter) meant that the court must accept the plaintiff's contentions regarding the existence of the debts as being the truth. (This conclusion applies to all three tranches of indebtedness: the debt of RM200,000 forming the Motasem debt, Motasem's RM1.3m debt that was to be discharged by the purchase of the 30% shares in Somaline Auto Services, as well as the debt of RM500,000 owed by AlAqsa to Aseel Resources). B C D

[39] I therefore found Motasem liable on the Motasem debt in the principal amount of RM200,000.

THE ALAQSA DEBT E

[40] The contentions advanced on behalf of AlAqsa were that the settlement agreement was not enforceable because:

(a) its company seal was not affixed on the settlement agreement; F

(b) there was no resolution passed by the board of directors of AlAqsa authorising its execution; and

(c) the matters contemplated by the joint venture agreement of 20 August 2015 did not materialise. G

[41] The last of these contentions clearly did not hold water. It was *because* of the fact that the joint venture did not materialise that it became necessary for AlAqsa to return the advances made by Aseel Resources.

H

[42] The settlement agreement need not be executed under seal. An agreement would be binding on a company even though it was executed under hand by its agent.

[43] Must this agent be duly authorised in all cases before the agreement binds the company? I

[44] It is settled law that an officer, employee or agent of a company may be clothed with implied authority to enter into agreements that will bind the

company. Implied authority connotes actual authority, but that authority need not be express.

[45] An agent may also bind its principal on the basis of ostensible authority. Here, the agent may not possess actual authority, and may even have been expressly denied authority to deal with a particular matter. Notwithstanding the absence of actual authority, the acts of the agent may still operate to bind the principal if the principal has represented to the putative counterparty that the agent in question had the requisite authority to deal on behalf of the principal.

[46] In the specific context of companies, a third party dealing with a company is entitled to expect that the company's internal procedures and rules have been adhered to, and that the person who purports to deal with the third party on behalf of the company has the requisite authority to bind the company. This is referred to as the rule in *Turquand*'s case (*The Royal British Bank v Turquand* (1856) 119 ER 886) or the indoor management rule.

[47] The rule was explained by Edgar Joseph Jr FCJ in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465; [1998] 1 AMR 169; [1998] 1 CLJ 793; [1997] 2 MLRA 202 in the following terms:

> Now, the main plank in the argument advanced by Dr Das for the purchaser was the rule in *Royal British Bank v Turquand*, which protects outsiders dealing with a company in good faith who are entitled to assume that acts within its constitution and powers have been properly performed, and are not bound to inquire whether acts of internal management have been regular.
>
> At this point, would interpolate to observe that the effect of the rule in *Turquand*'s case is that it reduces the enquiries which outsiders having dealings with a company — or more correctly outsiders who reasonably think they are having dealings with a company — must make, which, of course promotes business convenience. Such outsiders have no right to insist on proof by the company's directors that the provisions of its memorandum or articles have been complied with, and they cannot therefore be deemed to have constructive notice of some failure to comply which they have no means of discovering (*County of Gloucester Bank v Rudry Merthyr Steam and House Coal Colliery Co* [1895] 1 Ch 629 at p 636, per Lindley LJ) and it is this which provides the legal basis for the rule.
>
> In *Turquand*, the deed of settlement corresponding to the modern articles of association) had given permission to borrow subject to a general resolution of the company authorising the same. The bank had lent money to the company upon the security of a bond signed by two directors and given under the seal of the company. In an action brought by the bank to recover the money lent, the company had contended that no resolution of the kind required had been passed. In reply, the lender relied on the usual authority of directors. The Court of Exchequer Chamber held that the lender was entitled to succeed; this was because the company was

bound by the contract since the bank was entitled to infer that the necessary resolution had been passed.

[48] Of course, reliance may not be placed on the rule in *Turquand*'s case where the person dealing with the company in question has notice of any irregularity on the authority of the person with whom he is dealing.

[49] In the context of the present case, no such irregularity was pleaded. Nor was any evidence led that suggested there existed any infirmity in Motasem's authority to deal on behalf of the AlAqsa. Indeed, Motasem had earlier signed the joint venture agreement in August 2015 on behalf of AlAqsa, and no contention was raised that this joint venture agreement had been executed without proper authorisation. Furthermore, even Mr Chang, the solicitor acting for Motasem, had testified that there was nothing that would have led him to inquire further into the authority of Motasem to execute the settlement agreement for and on behalf of AlAqsa.

[50] In the circumstances, I am of the view that it was perfectly reasonable for Riad and Aseel Resources to expect that AlAqsa had complied with its own internal procedures to ensure that Motasem had the requisite authority to execute the settlement agreement on its behalf. As the Federal Court noted in *Pekan Nenas*, once the rule in *Turquand*'s case is held to apply, the presumption of regularity of the internal affairs of the company becomes an *irrebuttable presumption*.

[51] I thus found AlAqsa liable to Aseel Resources for the principal amount of RM500,000.

THE CONSIDERATION FOR THE SHARES

[52] It will be recalled that Motasem's position was that he was not liable to pay the RM1.3m consideration for the 30% shares in Somaline Auto Services because:

(a) the SSA never proceeded to completion. It was advanced in submissions that the SSA was subject to a condition precedent, and because this condition precedent was never fulfilled, the obligation on Motasem to make payment of the consideration expired; and

(b) Somaline Auto Services had been struck off the companies register. As such, both the SSA and the settlement agreement was unenforceable on account of frustration.

[53] I found that, on a true construction of the settlement agreement, the fact that the shares were never transferred did not have the effect of

extinguishing the debt, which remained payable under the terms of the settlement agreement. In addition, the facts as pleaded were sufficient to support an action on the original debt, and as such, it was immaterial that the SSA did not proceed to completion or that there was frustration of the SSA. Furthermore, it was not open to Motasem to rely upon frustration that was self-induced in order to escape his payment obligations under the SSA and the settlement agreement.

[54] These findings are explained in detail in the following paragraphs.

The condition precedent

[55] Clause 3.2 of the SSA provided as follows:

> 3.2 Non Fulfilment of the Conditions Precedent
>
> Subject to the terms as set out in this Agreement, unless specifically waived, if any of the Conditions Precedent are not fulfilled before the Conditional Period, this Agreement shall cease and determine and neither party shall have any claims against the other for costs, damages, compensations or otherwise, save for any antecedent breach of any representation, undertaking and any of the terms of this Agreement.

[56] The conditional period was defined to be the period before 30 April 2016, ie approximately one month after execution of the SSA.

[57] 'Conditions Precedent' was defined to mean the conditions set out in Schedule 3, which in turn provided the following single condition:

> The waiver of first right of refusal held by any of the other existing shareholders in the Company.

[58] However, no evidence was led that Lee Yoke Kuew, the other shareholder in the company holding 30% of its shares, actually possessed a right of first refusal to acquire the shares that were proposed to be sold. The defence did not adduce any evidence of any shareholders agreement, joint venture agreement or provisions of the articles of association that established the existence of a right of pre-emption of the shareholders in Somaline Auto Services. It was the defendants who raised the issue of non-fulfilment of the conditions precedent. Under s 103 of the Evidence Act 1950, the evidential burden of a fact in issue lies with the party seeking to convince the court of the existence of that fact. In my judgment, the defendants have not discharged this evidential burden.

[59] Moreover, Riad had testified that Motasem controlled and managed Somaline Auto Services, and his testimony in this regard was not refuted at trial. If Motasem controlled Somaline Auto Services despite being the legal

owner of only 40% of its issued share capital, it could reasonably be inferred that Lee Yoke Kuew held his 30% for the benefit of Motasem. There was thus no issue of any pre-emptive right arising.

[60] If there was no pre-emptive right (whether because the defence failed to prove its existence, or because all the other shares were beneficially owned by Motasem himself), then the SSA was an unconditional agreement. By failing to pay the first instalment, Motasem had breached its terms, and was liable to put Riad into the position he would have been had the SSA proceeded to completion.

[61] It was further advanced for the defendants that Riad had failed to deliver to Mr Chang (the solicitor) documents that were required for the transfer of the shares, such as the share certificates and the duly executed transfer forms, which were to be held by Mr Chang as stakeholder pending completion. Mr Chang himself had testified that he had written to Riad to remind him of his obligations under cl 4 of the SSA.

[62] I am of the view that the failure by Riad to deliver the relevant documents did not constitute a fundamental breach of the SSA that excused performance by Motasem of his payment obligations. Just because Riad did not deliver the documents as requested did not mean that Motasem was entitled to treat the SSA as being at an end.

[63] I also accept Riad's testimony that he had been told by Motasem that he (Motasem) would instruct the company secretary to prepare the necessary documents (Q&A 21 of WSP3) (Riad's testimony in this regard would not be inadmissible hearsay for two reasons: first, the purpose for which it was adduced was not to prove the truth of what was said, but rather the fact that the statement was made by Motasem to Riad. Secondly, there exists an exception to the rule against hearsay where a statement is sought to be proved against its maker). Riad was not cross-examined by counsel for the defendant on this point, and accordingly this amounted to acceptance of Riad's testimony: see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; [1980] 1 MLRA 125.

[64] If Motasem had told Riad that he would contact the company secretary to prepare the documents but the documents were never in fact prepared, the only reasonable conclusion was that Motasem never intended for the SSA to have proceeded to completion from the very outset. This conclusion is also consistent with the fact that Motasem never tendered payment for the other two debts on 30 April 2016. The fact that none of the three payment obligations were adhered to by 30 April 2016 showed that the defendants never had any intention of fulfilling their obligations under the settlement agreement or the SSA from the very beginning.

Frustration

[65] Frustration of the SSA was no answer to the plaintiffs' claim, because it was Motasem's own actions that had destroyed the subject matter forming the substratum of the SSA. The evidence received at trial showed that Motasem had applied on 4 November 2016 for Somaline Auto Services to be struck off the companies register. If a party to a contract had by his own conduct caused the frustration of the contract, he cannot then point to the fact of frustration to excuse the performance of his own obligations: see *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] All ER Rep 86; [1935] AC 524 (a decision of the Privy Council on appeal from Nova Scotia), applied in Malaysia by the Court of Appeal in *BIG Industrial Gas Sdn Bhd v Pan Wijaya Property Sdn Bhd and another appeal* [2018] 3 MLJ 326; [2018] 9 CLJ 1; [2018] 2 MLRA 577.

The true construction of the settlement arrangement

[66] The settlement agreement acknowledged that there was a debt of RM1.5m owed by Motasem to Riad. The settlement agreement placed an obligation on Motasem to repay this amount in five equal instalments. Part of the debt was the RM200,000 owed as the Motasem debt, and the remainder RM1.3m was to be paid in exchange for the transfer of the 30% shares held in Somaline Auto Services. The SSA documented the mechanism for the transfer of the shares.

[67] I am of the view that, based on a true construction of the SSA and the settlement agreement and taking into account the circumstances under which these agreements were entered into, the intent of the parties was for the debts owed by Motasem and AlAqsa to be repaid to Riad and Aseel Resources. The transfer of the shares in Somaline Auto Services was simply a means to this end. Thus the fact that the shares were never transferred did not have the effect of extinguishing the debt, which remained payable both under the terms of the settlement agreement as well as in an action on the original debt.

[68] It is settled law that that extrinsic evidence prior to and at the time of the contract is admissible for the purposes of construing the terms of a contract, save for matters pertaining to the negotiation of the contract that are merely declarative of a party's subjective intent: *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177; [2016] 1 MLRA 1. The position under the Evidence Act 1950 is the same as under the common law: see s 92(f) of the Evidence Act 1950, and the speech of Sundaresh Menon CJ in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] SGCA 43 at paras 45–48.

[69] The object of the exercise of construction is to ascertain the meaning of the contract to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. The test is thus an objective one: it does not matter what a party had in fact thought that a particular clause meant. The question is what would a reasonable person in the position of that party would have understood by the provision in question.

[70] The background of the transaction serves to put the transaction into context, and this context then used to ascertain what a reasonable person would have understood the words used to mean.

[71] In the context of this case, the sums that Riad sought to recover from Motasem were sums that were supposed to have been invested into the business of Somaline Auto Services Sdn Bhd. Riad testified that, after he had transferred these sums, he found out that the actual costs of setting up the motorcar workshop were only RM200,000.

[72] Motasem sought to establish at trial that he had indeed invested such sums into the business of Somaline Auto Services. To this end, he adduced invoices and cheques to evidence the investments.

[73] Now, it will be recalled that, as explained at paras 35–38 above, the fact that Motasem owed the debts to Riad has been established because such debts were recited in the settlement agreement, and because Motasem did not deny having signed the agreement. Motasem failed to provide a reasonable explanation (much less a credible explanation) for why he had signed the settlement agreement if the debts did not exist. In this regard, the attempt to adduce the invoices and cheques into evidence at the eleventh hour before trial could be said to have been an exercise in futility.

[74] One can only assume that Motasem expected the invoices and cheques to bolster his case. However, they had quite the opposite effect. The invoices and cheques exposed his contention that he had invested the sums advanced by Riad into Somaline Auto Services as being nothing more than a fabrication, for they established that he had actually funnelled the money into another company, Somaline Sdn Bhd, in which Riad owned no shares.

[75] Thus the three shares that Riad held in Somaline Auto Services (representing 30% of its share capital) were of little value to Riad, or even to Motasem (as he had not invested any significant money into Somaline Auto Services). Riad was primarily concerned with the recovery of the RM1.3m that he had advanced to Motasem, which was supposed to have been invested into the business.

[76] It is thus clear from the objective facts and surrounding circumstances of this case that the sale of the 30% shares in Somaline Auto Services were merely a means by which the RM1.3m was to be repaid to Riad. Whether or not the SSA proceeded to completion did not change the fact that the RM1.3m debt existed. That debt was only to have been extinguished had payment been made by Motasem for the shares. Because he failed to make such payment, that debt remained outstanding at the time the plaintiffs commenced this suit. Based on a proper construction of the settlement agreement, the sum of RM1.3m was payable by Motasem pursuant to cl 3 of the settlement agreement.

[77] In addition (and without affecting the conclusion in the preceding paragraph), I am also of the view that the sufficient facts have been pleaded in the statement of claim to support not just the plaintiff's claims under the settlement agreement and the SSA, but also an action for the recovery of the original debt.

[78] I accordingly found Motasem liable to repay the principal sum of RM1.3m to Riad.

FRAUD

[79] In submissions, Ms Gabriel for the plaintiffs urged the court to find Motasem liable for fraud. As we have seen, the evidence that Motasem attempted to adduce in support of his case established his own deceitful conduct in appropriating the money advanced by Riad.

[80] He attempted to show that he had indeed invested moneys for the purposes of joint venture in Somaline Auto Services, but his own evidence showed that the money had instead been diverted into another company he owned, Somaline Sdn Bhd, in which Riad had no interest. He had also applied to the Companies Commission for Somaline Auto Services to be struck off the companies register on account that it had never commenced business, had not undertaken any business, did not have any bank account and that there was no intention for it to commence business in the future. This again contradicted his assertion that substantial sums had been invested into Somaline Auto Services for rental, renovation and deposits for equipment.

[81] I therefore agree with Ms Gabriel that there was sufficient evidence before the court to support a claim for fraud on the part of Motasem.

[82] However, fraud was never pleaded in the statement of claim. The issue of fraud was raised for the first time in the submissions of counsel.

[83] The general rule is that parties are bound by their pleadings. As an exception to this general rule, where evidence adduced at trial by a party departs from the position taken in its pleadings, such evidence must be objected to as and when it is adduced. The failure by the opposing counsel to object will preclude him from subsequently arguing in submissions that that party ought be bound by his statement of claim: see *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185; [1994] 3 AMR 1882; [1994] 3 CLJ 567; [1994] 1 MLRA 300.

[84] If a party's failure to object in a timely manner to evidence adduced by that party's opponent will operate to prevent that party from limiting its opponent to the strict confines of the opponent's pleaded case, it would follow *a fortiori* that where a party's *own* evidence provides the basis for the departure from pleadings, it will not be competent for that party to object to reliance on that evidence by the opponent.

[85] However, in this case, the contention of fraud represented a radical departure from the plaintiffs' pleaded case. That would be impermissible without an amendment to the pleadings. Peh Swee Chin SCJ explained in *Superintendent of Lands and Surveys (4th Div) v Hamit bin Matusin*:

> As was stated by the Federal Court in *Ang Koon Kau & Anor v Lau Piang Ngong* [1984] 2 MLJ 277 (FC) at p 278:
>
> > Evidence given at the trial can therefore in appropriate circumstances overcome defects in the pleadings where the net result of such evidence is to prevent the other side from being taken by surprise.
>
> There is however, at least one important exception to such curing of defect of pleading by evidence departing from such pleading without objection then and there to such evidence.
>
> The exception is when such evidence represents a radical departure from the pleading, and is not just a variation, modification or development of what has been alleged in the pleading in question, please see *Waghorn v George Wimpey & Co Ltd* [1969] 1 WLR 1764, which gave rise to the proposition, which was approved by *Ang Koon Kau & Anor v Lau Piang Ngong and John Stein & Co Ltd v O'Hanlon* [1965] AC 890.

[86] The proper course would have been to for counsel for the plaintiff to apply, at the earliest available opportunity, to amend the pleadings when it became clear that the evidence sought to be adduced by the defence supported an alternative plea of fraud. An application for amendment in such circumstances would, in my view, be justified as the evidence was not earlier available to the plaintiffs.

[87] Absent any amendment on the pleadings, I was constrained to disregard

the contention of fraud. This decision was not, however, fatal to the plaintiffs' case, as the liability of the defendants was already proven based on the pleaded case.

SUMMARY AND CONCLUSION

[88] The following paragraphs summarises the decision of the court:

(a) I allowed Riad's claim for the Motasem debt. The settlement agreement proved the existence of the debts, including the Motasem debt. The evidential burden then shifted to Motasem to explain why he proceeded to the settlement agreement if, as he had contended, the Motasem debt did not exist. The failure by Motasem to provide a credible explanation meant that he failed to discharge this evidential burden;

(b) I allowed the claim by Aseel Resources against AlAqsa for the principal amount of RM500,000, as Aseel Resources and Riad was entitled to rely on the indoor management rule for the presumption that the requisite authorisation had been obtained in order for Motasem to execute the settlement agreement for and on behalf of AlAqsa;

(c) the plaintiffs' claim for the RM1.3m owed by Motasem to Riad was allowed, on the basis that:

(i) on a true construction of the settlement agreement, the fact that the shares were never transferred did not have the effect of extinguishing the debt, which remained payable under the terms of the settlement agreement; and

(ii) the facts as pleaded were sufficient to support an action on the original debt;

(d) the claim for fraud was dismissed. Although there was sufficient evidence received in this case to support a claim for fraud, fraud was never pleaded, and represented a radical departure from the plaintiffs' pleaded case;

(e) I awarded general damages for the plaintiffs in the amount of RM10,000;

(f) I awarded pre-judgment interest at a rate of 5%pa on the aggregate damages awarded from 30 April 2016 until the date of judgment, and post-judgment interest thereafter at a rate 5%pa until full satisfaction; and

(g) I ordered costs against the defendants in the amount of RM20,000, such costs to be subject to an allocatur.

Claim allowed in part with costs RM20,000.

Reported by Izzat Fauzan